

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BOARD OF PATENT APPEALS AND INTERFERENCES**

In re Application of AARON M LAMSTEIN Application No. 10/801,240 Filing Date: 3/15/2004 For: PET BED	Group Art Unit: 3643 Examiner: Andrea M. Valenti APPEAL BRIEF
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**BOARD OF PATENT APPEALS AND
INTERFERENCES**

Commissioner for Patents
Post Office Box 1450
Alexandria VA 22313-1450

Sir:

The following represents applicant's Brief on Appeal of the final rejection dated January 8, 2010. A timely Notice of Appeal was filed on February 8, 2010. As such, the present Brief on Appeal is timely.

I. REAL PARTY IN INTEREST

The real party in interest is Worldwise, Inc.

II. RELATED APPEALS AND INTERFERENCES

To the best of applicant's knowledge, there are no applications, patents, appeals or interferences or prior pending appeals or judicial proceedings which may be related to, directly affect or be directly affected by or have a bearing on the Board's decision in this appeal.

III. STATUS OF THE CLAIMS

Claims 1-9 are finally rejected and are being appealed.

IV. STATUS OF AMENDMENTS

Applicant has filed no amendment after final rejection.

V. SUMMARY OF CLAIMED SUBJECT MATTER

Applicant has but a single independent claim on appeal, the remaining claims being either directly or indirectly dependent thereon. Claim 1, including references to support the various elements thereof is as follows which recites the concise explanation of the subject matter of this independent claim involved in the appeal.

1. A pet bed for use by cats (p. 3, l. 2, Fig. 1, element 10), said pet bed comprising a resilient, compressible fill material (p. 4, l. 13, 14, Fig. 2, element 16) and an outer shell fabric defining the geometry of the pet bed (p. 4, l. 13, Fig. 1, elements 11, 12) as having a bottom (Fig. 1, element 12) and sides and a top (Fig. 1, elements 11, 13), the latter comprising a plush and gas permeable fabric (Fig. 1, element 13, p. 4, l. 17, 18), a closable opening in said outer shell fabric (Fig. 2, element 35, Fig. 1, element 14) allowing for selective access to the interior of said outer shell fabric (p. 9, l. 6-16), a gas permeable pouch containing catnip located beneath said top fabric (Fig. 2, element 21) and within said closeable opening (p. 4, l. 28-p. 5, l. 5) such that scent from said catnip is caused to permeate through the said gas permeable pouch and gas permeable top fabric (p. 5, l. 17-28).

VI. GROUNDS OF REJECTION AS REVIEWED ON APPEAL

Claims 1-9 stand rejected under 35 USC 103(a) as being unpatentable over U.S. Patent No. 6,305,318 to Ford in view of U.S. Patent No. 6,435,133 to Wayne.

VII. ARGUMENT

Pursuant to the position taken by the Examiner, claims 1-9 are rejected under 35 USC 103(a) as being unpatentable over U.S. Patent No. 6,305,318 to Ford in view of U.S. Patent No. 6,435,133 to Wayne.

Regarding claim 1, the Examiner asserts that Ford teaches a pet bed for use by cats (Col. 1, l. 11), said pet bed comprising a resilient, compressible fill material (13), and an outer shell fabric (#2) defining the geometry of the pet bed as having a bottom, sides and

a top, the later comprising a gas permeable fabric (Col. 2, l. 24-29), a closable opening in said outer shell fabric allowing for selective access to the interior of said outer shell fabric (Fig. 2 #9), a gas permeable pouch (19) containing catnip located beneath said top fabric such that scent from said catnip is caused to permeate through the said gas permeable pouch and gas permeable top fabric.

The Examiner continues that Ford is silent on explicitly teaching that the catnip pouch is located within the closable opening. However, merely shifting the location of a known element performing the same intended function of providing a removable scent that attracts cats, shifted for the motivation to prevent easy access by the animal, does not present a patentably distinct limitation over the prior art of record [*In re Japikse*, 181 F.2d 1019, 1023, 86 USPC 70, 73 (CCPA 1950)].

The Examiner further asserts that Ford teaches a canvas-like fabric (Ford denim Col. 2, l. 28), but is silent on explicitly teaching a plush fabric. However, Wayne teaches a pet bed for use by cats that has a plush fabric surface (Wayne Col. 3, line 29 and Col. 4, line 7-8). Wayne teaches it is known to substitute a plush fabric for a canvas-like fabric. The Examiner concludes that it would have been obvious to one of ordinary skill in the art to modify the teachings of Ford with the teachings of Wayne at the time of the invention to create a more comfortable bed for the animal. The modification is merely the selection of a known alternate material for intended use (*Leshin* 125 USPC 416) to obtain predictable results.

Regarding claim 2, the Examiner notes that Ford as modified teaches the said gas permeable pouch (19) containing catnip is located between the resilient compressible fill material and top fabric (Fig. 5) and in contact with the resilient fill material (Ford as modified in 19 within 9).

Regarding claims 8 and 9, the Examiner is of the belief that Ford as modified teaches that the top fabric and pouch materials are sufficiently permeable (Ford Col. 2, line 66-65) such that the reference inherently teaches that as the top fabric is depressed by the weight of the cat using said pet bed, scent from said catnip is caused to permeate through the gas permeable pouch and gas permeable top surface or when the gas permeable pouch is squeezed, scent from the catnip is caused to permeate through the gas permeable pouch and gas permeable top surface when the animal is present on top of the bed.

Regarding claim 3, the Examiner noted that Ford as modified is silent on the gas permeable pouch containing catnip being located beneath the resilient compressible fill material and thus separated from the top by the resilient compressible fill material. However, according to the Examiner, it would have been obvious to one of ordinary skill in the art to modify the teachings at the time of the invention since the modification is merely the shifting location of a known element, for ease of assembly or desired attractive powers, performing the same intended function and does not present a patentably distinct limitation [*In re Japikse*, 181 F.2d 1019, 1023, 86 USPQ 70, 73 (CCPA 1950)]. Furthermore, applicant has not claimed the orientation of the bed, therefore, if the bed got turned upside down the catnip inherently would be located under the fill material. Thus it is merely a relative limitation to the orientation of the pillow.

Regarding claims 5 and 7, the Examiner continues that Ford as modified teaches the gas permeable pouch being attached to an interior surface of the top fabric by providing the interior surface with a fabric pocket sized to receive the pouch (Fig. 5); Ford as modified by placing 19 within 9 and closing; merely making a known component integral to prevent displacement does not present a patentably distinct limitation over the prior art of record [*In re Larson*, 340 F.2d 965,967, 144 USPQ 347, 349 (CCPA 1965)]

Regarding claim 6, the Examiner notes that Ford as modified teaches that hook and loop fasteners are a known means of securing things in place (9), but is silent on the gas permeable pouch being attached to an interior surface of said top fabric by hook-and-loop fasteners. However, the Examiner believes that it would have been obvious to one of ordinary skill in the art to modify the teachings of Ford at the time of the invention with a known fastening means to prevent the catnip from becoming undesirably displaced. [*In re Larson*, 340 F.2d 965,967, 144 USPQ 347,349 (CCPA 1965)].

Regarding claim 4, the Examiner notes that Ford as modified is silent on the gas permeable pouch being characterized as having a closable opening so that catnip can be periodically refillably introduced to the pouch. However, the Examiner opines that it is old and notoriously well-known to provide recyclable pouches as an environmentally sound practice to reduce waste. It would have been obvious to one of ordinary skill in the art to modify the teachings at the time of the invention for the cost reducing and environmentally beneficial results.

The present invention involves a pet bed and, specifically, a pet bed for use by cats. By the appropriate selection of fabrics, the pet bed can be made to be particularly attractive to cats by positioning a source of catnip strategically below the top surface of the bedding such that the catnip is inaccessible to the cat employing the bed while promoting the scent of catnip to permeate the bed's top surface as the cat employs the bed. See Specification, p. 1, l 7-11.

Pet bed 10 (Fig. 1) includes outer shell fabric 11 and 12 defining the bed's geometry. The bed 10 is maintained by a resilient compressible fill material 16. Top fabric 13 of pet bed 10 is comprised of a plush, high loft fabric which is gas permeable and which is provided with a thickness and texture so as to provide a sleeping surface that a cat would find attractive both from the standpoint of comfort as well as to provide a somewhat roughened surface, conducive to promote anticipated rubbing and rolling actions as the catnip creates its desired effect.

A gas permeable pouch 21 (Fig. 2a) is shown as containing catnip 20 located beneath plush, high loft fabric top surface 13 held in position by compressible interface between resistant, compressible fill material 16 and top plush and gas permeable fabric 13. Ideally, gas permeable pouch 21 is geometrically centered atop resilient, compressible fill material 16 shown in phantom in Fig. 1.

A gas permeable pouch 21 can alternatively be sealed as a one time use, throw away item as the effects of catnip 20 are dissipated or can be refillable. Access to the interior of pet bed 10 is done through a closable opening to enable a user to periodically access gas permeable pouch 21 but is not openable by a cat as gaining access to the gas permeable pouch 21 could prove detrimental to the feline using the present invention. As shown in Fig. 1, conventional access to the interior of pet bed 10 can be provided by zippered closure 14 configured along seam 15. A hook and loop or zippered closure can be provided as well within top fabric 13.

Notwithstanding the conclusions reached by the Examiner, there is not a single suggestion in Ford to place a pouch containing catnip beneath a gas permeable fabric or to provide a closable opening in an outer shell fabric allowing for selective access to the interior of the outer shell fabric for placement of a gas permeable pouch containing catnip. There is further not a single suggestion of placing the gas permeable pouch

containing catnip between the resilient compressible fill material of the pet bed and the shell fabric either at the top of the compressible fill material or beneath the compressible fill material as suggested alternatively by claims 2 and 3.

It is quite evident that Ford teaches placing a pouch of scented material, which could be catnip, in a pocket of an outer shell material configured in the shape of a pair of human shorts. As such, the pouch of scented material is placed between two layers of outer shell material and not between outer shell material and the requisite resilient compressible fill material. Although this distinction may seem trivial, it is significant in practicing the claimed invention. Specifically, cats tend to become quite agitated and excited when confronted with a source of catnip. A cat will stop at almost no length to reach the catnip although it is odor emanating from the catnip and not the catnip leaf itself which provides the observed catnip response. By placing the pouch of catnip beneath the outer shell fabric and between the outer shell fabric and the resilient fill material, one is able to generate the desired catnip response by causing catnip odors to pass through the outer shell fabric when the cat has compressed the pet bed by residing upon it with its body weight while ensuring that short of destroying the outer shell fabric, the cat will be unable to reach the catnip under any and all circumstances.

By contrast, Ford teaches placing a pouch of a scented material within a pocket of the outer shell shorts between layers of outer shell material. Clearly, Ford fails to render the present invention obvious under 35 USC 103. By placing a scented pouch within the opened pocket of a pair of human shorts, one is not presenting a very substantial obstacle to a cat driven by a catnip response from pawing the interior of the pocket and gaining direct physical access to the catnip pouch which could be quite detrimental to the health of a cat. There is no suggestion in Ford that the pocket be closable or that any attempt be made to restrict access to the pocket by a cat intent upon gaining access to the interior pocket region. This should come as no great surprise for although Ford mentions, in passing, catnip is a possible "scented material" that can be employed, it is not the thrust of Ford to provide a bed generating a catnip response. Instead, it is the intent of Ford to simply provide a pet bed in the shape of a human lap which may contain a scented material of one of many varieties.

It appears that the Examiner has seen fit to simply ignore the limitation found in all of the claims that the gas permeable pouch containing catnip is retained within a closable opening in the outer shell fabric allowing for selective access to the interior of the outer shell fabric. The Examiner has opined that, in referring to Fig. 2, element 9 and col. 2, l. 36-41 of Ford, that the patentee teaches a closable opening. However, there is no teaching in Ford either in the quoted section or otherwise of the reference which teaches that the pocket of Ford intended to receive the patentee's scented material is closable. In fact, just the opposite is implied for a mere side pocket is configured within the Ford article which is devoid of any closure means whatsoever. Clearly, a cat intending to gain access to a gas permeable pouch filled with catnip would easily be able to pull the pouch from the pocket of Ford thus defeating the intent of the present invention.

There is again nothing in the Ford reference suggesting locating the gas permeable pouch containing catnip between the resilient compressible fill material and top fabric. In opining upon claim 2, the Examiner points to Fig. 5. However, Fig. 5 merely shows the scented pouch placed within the pocket of a configured pair of shorts and not between the outer fabric and the shell material. As to claim 2, the real issue is whether Ford teaches placing the gas permeable pouch containing catnip between the resilient compressible fill material and top fabric. Simply put, Ford does not so teach. The prior art fails to render claim 2 obvious as a result of the citation of the Ford patent.

Regarding claims 8 and 9, the Examiner has taken the position that Ford inherently teaches that as the top fabric is depressed by the weight of a cat using the pet bed, that scent from the catnip is caused to permeate through the gas permeable pouch and gas permeable top surface. However, there is nothing in the prior art to suggest this being the case. In all likelihood, any fragrance emanating from the Ford bed would pass from the open pocket and not through the outer shell material. In fact, that is probably the reason why the pocket does not close. Further, applicant takes exception with the Examiner's characterization that claims 8 and 9 are merely functional. Clearly, these claims characterize the gas permeability of the top fabric and pouch.

As to claim 3, Ford fails to teach locating the gas permeable pouch beneath the resilient compressible fill material. The Examiner, has opined that it would be obvious to one of ordinary skill in the art to modify the teachings of the reference since the

modification is merely the shifting location of a known element performing the same intended function and does not present a patentably distinct limitation. At the outset, applicant notes that Ford teaches absolutely no means of changing the location of the catnip pouch as it must be placed within the pocket element of the prior art pet bed. Contrary to the Examiner's conclusion the modification is not obvious. Certainly placing the pouch of catnip below the resilient compressible fill material will enable a user to dictate the proximity of the catnip to the cat employing the bed providing additional flexibility by controlling the intensity of the catnip response. Again, none of this is shown in the reference

Claims 5, 6 and 7 deal with retaining the gas permeable pouch in a specific location within the pet bed. Claim 5 calls for the pouch being attachable to the interior surface of the top fabric while claim 6 calls for doing so by employing hook-and-loop fasteners and claim 7 does so by providing a pocket sized to receive the subject pouch. There is clearly a benefit in securing the pouch to a specific location to prevent it from inadvertently dislodging and moving to a side location within the pet bed thus reducing its effectiveness. Ford, in simply providing a scented material within a pocket of a pair of shorts fails to disclose any of this. The fact that Ford teaches that hook and loop fasteners are known means of securing things in place is of no avail. The fasteners employed by Ford have nothing to do with the gas permeable pouch disclosed therein.

For the reasons advanced above, it is respectfully asserted that the final rejection was entered in error and reversal of the final rejection is therefore earnestly solicited

Respectfully submitted.

BAY AREA TECHNOLOGY LAW GROUP PC

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CLAIMS APPENDIX

1. A pet bed for use by cats, said pet bed comprising a resilient, compressible fill material, and an outer shell fabric defining the geometry of the pet bed as having a bottom and sides and a top, the later comprising a plush and gas permeable fabric, a closable opening in said outer shell fabric allowing for selective access to the interior of said outer shell fabric, a gas permeable pouch containing catnip located beneath said top fabric and within said closeable opening such that scent from said catnip is caused to permeate through the said gas permeable pouch and gas permeable top fabric.
2. The pet bed of claim 1 wherein said gas permeable pouch containing catnip is located between said resilient compressible fill material and said top fabric and in contact with the resilient fill material
3. The pet bed of claim 1 wherein said gas permeable pouch containing catnip is located beneath said resilient compressible fill material and thus separated from said top by the resilient compressible fill material.
4. The pet bed of claim 1, wherein said gas permeable pouch is characterized as having a closable opening so that catnip can be periodically refillably introduced to said pouch
5. The pet bed of claim 1, wherein said gas permeable pouch is attached to an interior surface of said top fabric.
6. The pet bed of claim 5, wherein said gas permeable pouch is attached to an interior surface of said top fabric by hook-and-loop fasteners
7. The pet bed of claim 5, wherein said gas permeable pouch is attached to an interior surface of said top fabric by providing said interior surface with a fabric pocket sized to receive said pouch

8. The pet bed of claim 1 wherein said top fabric and pouch materials are sufficiently permeable such that as said top fabric is depressed by the weight of the cat using said pet bed, scent from said catnip is caused to permeate through said gas permeable pouch and gas permeable top surface.

9. The pet bed of claim 8 wherein as said gas permeable pouch is squeezed, scent from said catnip is caused to permeate through said gas permeable pouch and gas permeable top surface.

RELATED PROCEEDING APPENDIX

None